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Supreme Court of the United States

No. 712

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION, A CORPORATION, PETITIONER,

VS.

PEARL COHEN, EXECUTRIX OF THE ESTATE OF LOUIS COHEN, DECEASED, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Supreme Court of the United States

No. _____.

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION, A CORPORATION, PETITIONER,

VS.

PEARL COHEN, EXECUTRIX OF THE ESTATE OF LOUIS COHEN, DECEASED, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Mutual Benefit Health & Accident Association, a corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above case on March 11, 1952 (R. 253).

OPINION BELOW.

The memorandum opinion of the District Court appears at pages 26 to 32 of the record, and at 90 F. Supp. 754. The opinion of the Court of Appeals appears at pages 177 to 201 of the record and at 194 F. 2d 232.

JURISDICTION.

The opinion of the Court of Appeals was filed on January 10, 1952, and judgment entered (R. 202). Motion for rehearing was filed in due course but was overruled on March 11, 1952, which is the effective date of the judgment under the rules of that court. The jurisdiction of this court is invoked under Title 28, U. S. C., Section 1254 (1).

QUESTIONS PRESENTED.

(1) May a Court of Appeals of the United States, under the doctrine of *Erie R. R.* v. *Tompkins*, 304 U. S. 64, speculate and render "an Informed Prophecy" (so stated) as to what a state court would probably decide where no court of the state has so held on similar facts, and where the final result is opposed to basic contract principles?

(2) Is a conflict presented between the Rules of Decision adopted by the different Courts of Appeals with reference to following state court *dicta*?

(3) May the Court of Appeals for the Eighth Circuit apply a rule of decision of its own creation by which it accepts a "permissible conclusion" of a District Judge on a doubtful question of state law, so that in effect, it declines to perform its own independent duty to determine the local law?

STATUTES INVOLVED.

No statutes are involved except those relating to the appellate jurisdiction of the Courts of Appeals and the Rules of Decision Act, which are respectively: 28 U. S. C., Sections 1291, 1294 and 28 U. S. C., Section 1652.

STATEMENT OF THE CASE.

Petitioner (defendant below) issued a policy of health and accident insurance to one Louis Cohen in 1928, when he was 50 years old, providing (among other things) for payments of two hundred dollars per month for continuous, total and confining disability from sickness (Policy R. 69-81). The policy was strictly one of renewable term insurance (so held R. 182). It contained a provision as follows (Additional Prov. (c) R. 79):

> "The acceptance of any premium on this policy shall be optional with the association * * *."

The Court of Appeals has directly upheld the validity of this option provision, as indeed have also the Courts of Missouri (*Ray* v. *Mutual Benefit Health & Acc. Assn.*, (Spr. App.) 220 S. W. 2d 622), and other states. The policy also contained a so-called "Non-Cancellable" rider (R. 71) which expressly prohibited any cancellation during any period *"for which the premium has been paid."* Quarterly premiums were paid and received on this policy without unusual incident until after the insured passed the age of 65 years; then, the insurer wrote him (R. 106, 167) stating, in substance, that it could only give him coverage thereafter upon a limited basis and in accordance with a "One-Year Limiting Rider" (R. 103, 155) which was enclosed with the letter in duplicate, with the suggestion that it be executed and returned. This rider was in part as follows:

> "In consideration of the acceptance of any renewal or reinstatement premium * * * one year shall be the maximum period for which benefits are payable for loss of time * * *. This rider shall be effective on the date of the next premium payment on said policy."

The record shows conclusively that the insurer would not have accepted any further premiums but for the execution of the proffered rider (R. 95, 113, 107, 94, 111, 118, 119, 127, 132), but that it was executed by the insured and concurrently a quarterly premium (in advance) was paid and accepted on October 30, 1942, for a period of insurance from November 1, 1942 to February 1, 1943. Thereafter premiums were regularly paid and accepted to and including May 1, 1948.

In April, 1947, Mr. Cohen became ill and made claim; the insurer paid him benefits for one full year and declined further liability by reason of the "One-Year Limiting Rider." Up to that time no complaint whatever had been made by the insured concerning the rider or the status of the insurance. Suits were instituted for additional benefits, giving rise to the present controversy. Respondent claimed (among various other things) that this rider was invalid for lack of consideration.

The District Court (with a jury) entered judgment for the insured (Respondent here). The Court of Appeals, after disposing of various controverted issues in petitioner's favor (including holdings of the validity of the option to refuse renewal premiums, the fact that the policy was unambiguous, and that there had been no attempt to change the coverage *during* a period of coverage, but only prospectively as of November 1, 1942), proceeded to determine that the rider was without consideration by reason of a supposed dictum in the case of *Rice* v. *Provident Life & Accident Ins. Co.,* (Kansas City App.) 231 Mo. App. 560, 102 S. W. 2d 147, and also in view of a *"permissible conclusion"* by the trial court (R. 193) on a question of local law. In so holding the Court of Appeals noted expressly that the *Rice* decision was not "authoritatively controlling, because of differences in issues and facts," but

that it pointed to the conclusion that, were this case before that court, "the result would have been against the company" (R. 193); the court further said that the problem in such cases *"becomes one of an informed prophecy as to what the state courts would probably decide were the issue before them. * * * We take merely the judicial venture which seems to us as most probably anticipating what the state courts would determine as to the state law."* (R. 193-194).

REASONS FOR GRANTING THE WRIT.

I.

The Court of Appeals Has Departed from the Accepted and Usual Course of Judicial Proceedings in Speculating As to What an Intermediate Missouri Appellate Court Would Probably Have Decided under Facts Never Before It, and Has Erroneously Failed to Apply the Missouri Law.

The question involved in this case was essentially one of basic contract law. It has been determined that the coverage of this policy was strictly term insurance; the then-current term expired on November 1, 1942. Before that date the parties agreed upon a change in the form of coverage *for a future period or periods*, concurrently with the payment and acceptance of the premium, and immediately a new irrevocable coverage was granted for a period of three months. This was both a benefit to the promisor (Mr. Cohen, who agreed to the change) and a detriment to the promisee (the company, which thereupon assumed a definite future risk) either of which would furnish sufficient consideration. To hold otherwise is to repudiate one of the most elementary contract principles,

and to presume to make a different contract for the parties. It is no function of the courts to say that a contract was unwise, or a consideration inadequate.

The Court of Appeals has thought that the opinion in *Rice* v. *Provident Life & Accident Ins. Co.*, 231 Mo. App. 560, 102 S. W. 2d 147, lent some color to the contention of a lack of consideration for this rider. As a prelude to any further discussion of the present decision, we should examine that opinion briefly. There the insurer in a health and accident policy containing a provision *permitting cancellation* at any time (by returning the pro-rata premium) affixed a limiting rider purportedly effective by its very terms *during* a period for which the premium had been paid. It was there held that the limiting rider was invalid because (1) it was affixed and purportedly made effective *during* a contract term for which a premium had already been paid; and (2) because the company gave the insured *nothing* and, despite the limitation so affixed, could have *cancelled* the policy the next day (or at any other time) pursuant to its reserved right of cancellation. In other words, the insurer there suffered no detriment and gave nothing, and the insured received no benefit which he could insist upon thereafter as a matter of right. That decision, properly considered, is not violative of ordinary contract provisions. Indeed the court there (as an expression of recognized Missouri law) stated, l. c. 150:

> "* * * It is true that, in instances where there is a detriment to the promisee, a consideration is held to exist the same as where there is a benefit to the promisor. *Thompson* v. *McCune*, 333 Mo. 758, 63 S. W. 2d 41."

But the court further said, l. c. 150, 151:

> "* * * The defendant had the same right to cancel the policy immediately upon the execution of the

rider as it had before. There was therefore to it no detriment in agreeing to the rider. *It cannot be said either that the defendant waived an increase of premium in consenting to the rider or that it waived its right of immediate cancellation of the policy.* Nor can it be said that the plaintiff was relieved of any danger of the immediate cancellation of his policy by reason of the fact that the rider was executed and purported to be attached thereto" (Emphasis ours).

The opinion seems to indicate clearly that if the insurer had actually given the insured anything of value in the transaction such would furnish a valid consideration for the modification (or for the new contract, if it be so considered). And indeed such is the Missouri law. *Scriba* v. *Neely*, 130 Mo. App. 258, 261, 109 S. W. 845; and see cases cited hereinafter under this point. The language used in the *Rice* case must be considered in the light of the facts there; and, if a limitation added *during* an existing term of insurance was invalid there because the company could still *cancel* the policy at will, then a limitation imposed at a renewal date might *there* be likewise invalid for precisely the same reason (for the insurer could still cancel the policy at any time).

But the Court of Appeals has wholly failed to note that the very converse is true on the facts in the present case, *i. e.*, that the policy expressly *prohibits* a cancellation during any period for which a premium has been paid, and that on October 30, 1942 (by acceptance of a quarterly premium), the insured was given irrevocable insurance for (at least) three months after November 1st. This insurance could not thereafter be taken from him. And certainly the adequacy of such a consideration will not be inquired into (*Brown* v. *Weare*, 348 Mo. 135, 152 S. W. 2d 649).

The language of the *Rice* opinion suggesting (perhaps as a dictum applicable to *that* policy) that the insurer would have no right to refuse a renewal premium on condition of demanding an increased premium, has no applicability whatever to our present situation because (1) the court was considering a lack of consideration which was always present there because of the ever-present right to cancel; and (2) there is in our case a demonstrated consideration on basic contract principles. Yet the Court of Appeals has seized upon and followed that language here. We may see that there was not in the *Rice* opinion even a respectable *dictum* logically applicable to the present case. Our construction of the *Rice* case is corroborated by what is said of that case in Appelman on Insurance, Vol. 13, Sec. 7606; there the author notes that the court held that there was no consideration for the rider:

> "* * * *since a failure to increase the premium did not deprive the insurer of its right to cancel the policy after the rider was executed*" (Emphasis ours).

Indeed the Missouri decisions in *Ray* v. *Mutual Benefit Health & Accident Assoc.*, (Spr. App.) 220 S. W. 2d 622, and *Clardy* v. *Universal Life*, (K. C. App.) 229 Mo. App. 682, 79 S. W. 2d 509, are much more applicable to the present situation. In the *Ray* case the policy was substantially identical, and if we consider that in our case the company refused the premium on the *old coverage* (which it actually did), then the facts are substantially the same. That decision definitely established the right to refuse the premium, which would necessarily mean that the company was free to contract for a different coverage.

Yet the Court of Appeals, recognizing that ordinarily the language of an opinion should be confined to the facts there under consideration (R. 192) and citing both Federal and Missouri authorities to the foregoing effect, held

that "*the problem then becomes one of an informed prophecy as to what the state courts would probably decide* * * *," and it concludes that the Kansas City Court of Appeals would probably have decided against the insurer in the present case. It expressly declined to intimate its own view on the merits.

We revert, for the moment, to the proposition that under established Missouri law and the general law elsewhere, the parties to a contract may always modify it, or they may abandon it and make a new contract, upon any legal consideration; and that such consideration may always consist either of a benefit to the promisor or a detriment to the promisee. (*State ex rel. Kansas City* v. *Highway Comm.*, 349 Mo. 865, 163 S. W. 2d 948; *Duvall* v. *Duncan*, 341 Mo. 1129, 111 S. W. 2d 89; *Thompson* v. *McCune*, 333 Mo. 758, 63 S. W. 2d 41; *Starr* v. *Crenshaw*, 279 Mo. 344, 213 S. W. 811; *Rice* v. *Provident Life, etc.*, *supra*). We thus see that when the Court of Appeals embraced the so-called *dictum* of the Rice opinion—ignoring the uncontradicted fact that in the present case the insurer had irrevocably granted three months of future insurance as a consideration for the execution of the rider—the court thus proceeded directly *contra* to the basic principles of contract law as applied universally in the Missouri courts.

We respectfully submit that a Court of Appeals of the United States should not be permitted to *speculate, guess* or *prophesy* on what a Missouri court might decide on a set of facts never before that court (or any other Missouri Appellate Court) and particularly so when the "*prophecy*" contravenes basic contract principles as previously applied. We further believe and submit that the course pursued by the court here constituted an unwarranted extension of the doctrine announced by this court in the *Erie* case, and that it should be reviewed.

II.

The Court of Appeals Has Created a Conflict in the Rules of Decision Between Different Circuits by Following a Supposed Isolated Dictum of a Missouri Appellate Court Without Attempting to Determine the Local Law Otherwise, or to Decide the Question Independently.

There was really no *dictum* in the *Rice* opinion which could properly be applicable here. But since the Court of Appeals did assume to follow what it considered to be such, we suggest that even so its action was improper. In the case cited by the Court of Appeals (*Osaka Shosen Line* v. *U. S.*, 300 U. S. 98, 102-103) as indicating that dicta "may be respected," this court also said:

> "* * * and its language must be read accordingly, for—'It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision.' *Cohens* v. *Virginia*, 6 Wheat 264, 399; *Humphrey's Executor* v. *United States*, 295 U. S. 602, 626-627."

That case was decided in 1937 and actually had nothing to do with questions of state law or state decisions.

We do not find that this court has ever directly determined whether a Federal Court should (or must) follow *obiter dictum* of a state appellate court, unsupported by any other persuasive evidence of the state law. The opinion in *King* v. *Order of United Commercial Travelers*, 333 U. S. 153, is instructive, but involves a somewhat different question. In *Helvering* v. *Fitch*, 309 U. S. 149, this court indicated that in any event the Federal Courts may

not *conjecture* as to the state law on any given state of facts, but should follow the rule which seems most likely to have been definitely settled (such as, we say, the basic contract principles generally recognized as applicable on the present facts). In *Six Companies* v. *Joint Highway District,* 311 U. S. 180, this court examined in much detail the decision of an intermediate California Appellate Court, and pointed out that the controverted language there was a matter of decision and *not mere dictum* (l. c. 187). And the *"weight of reason"* of any statement contained in a state court opinion "must depend on what it (actually) contains." *Carroll* v. *Carroll's Lessee,* 16 How. (57 U. S.) 275, 287 (Insert in parentheses is ours).

We note the following decisions which we believe are opposed to the rule adopted in the present case:

In *New England Mutual Life Ins. Co.* v. *Mitchell,* (4 Cir.) 118 F. 2d 414 (cert. denied 314 U. S. 629), the court considered the effect of a life policy provision against suicide (under Virginia law) as affected by language in a prior Virginia case where a different policy provision and different facts were involved. The court there (by Judge Parker) said, l. c. 419:

> "In the light of the decision in the Darden case, we do not think that the dictum in the Massey case upon which plaintiff relies has even persuasive value. But we would not feel bound to follow it in any event. We recognize, of course, our duty to ascertain and apply the law of Virginia to the facts of the case; but mere dicta have never been received as conclusive evidence of the law of any state, and clearly they ought not be followed when opposed to what we regard as the sound and reasonable rule arising out of the common law of the state."

Then, after discussing decisions of this court regarding applicable state law and the extent to which it is binding

(principally constructions of statutes), the court further said, l. c. 420:

> "Nothing in recent decisions has in anywise weakened this rule or the sound basis of reason upon which it rests. In ascertaining the applicable law of the state, we are to consider court decisions and other available sources of local law; and we are to apply court decisions in the light of the well-established *stare decisis* rule and its limitations. Cf. *West* v. *American Tel. & Tel. Co.*, 61 S. Ct. 179, 85 L. Ed. ..... We are not required, however, to speculate as to how the state court might decide the question before us if it has not already decided it. Nor should we surrender our own judgment as to what the local law is on account of dicta or other chance expressions of the judges of the local courts. The respectful attitude towards the local court, where there has been no decision on the precise question before us, is to consider that question in the light of the common law of the state, with a view of reaching the decision which reason dictates, and with the faith that the local court will reach the same decision when the question comes before it. To base a decision upon dicta, or upon speculation as to what the local court might decide in the light of dicta, would be to depart from our solemn duty in the premises and embark upon a vain and illusory enterprise."

The same court in *Powell* v. *Maryland Trust Co.*, 125 F. 2d 260 (cert. denied 316 U. S. 671, 711), said, l. c. 269:

> "The question before us is whether a stock dividend is a true dividend so as to be included in the reservation of dividends contained in the mortgage; and, as stated, the Maryland decisions are not determinative of this question. To apply the rule which they lay down with respect to the rights of life tenant and remainderman to the question before us, instead of the rule prescribed by reason for such a situation, is not required by *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, or by any

other decision. To reason from analogy and apply the rule because of what we may guess the Maryland court would have decided if the case had been before it, is to indulge in vain speculation. If the Maryland court, in any of the cases before it, had expressed an opinion on the question before us, which it did not do, it would have been a mere dictum, and one which we would have been under no obligation to follow. *Carroll* v. *Carroll*, 16 How. 275, 286, 14 L. Ed. 936; *New England Mut. Life Ins. Co.* v. *Mitchell*, 4 Cir., 118 F. 2d 414, certiorari denied 62 S. Ct. 60, 86 L. Ed. ....."

The court then reviewed with approval its decision in the *Mitchell* case, *supra.*

In *DeLong* v. *Jefferson Standard Life Ins. Co.*, (5 Cir.) 109 F. 2d 585 (cert. denied 310 U. S. 635), the Court of Appeals considered a certain Florida decision as not binding upon the Federal Courts because the precise question involved was "not made an issue in the case" (l. c. 586). Indeed, the Court of Appeals in the present opinion cites the *DeLong* case, *supra*, as holding that dicta of state courts are not binding on the Federal Courts.

In *Buder* v. *New York Trust Co.*, (2 Cir.) 107 F. 2d 705 (cert. denied 309 U. S. 677), the court said, l. c. 705, 706:

> "It is argued that our former interpretation of contract of pledge was erroneous and not in harmony with the law of New York, which concededly must control in view of the *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487. But we find no New York decision which conflicts with the views expressed in our former opinion. Dicta by a trial court justice in *Cole* v. *Manufacturers Trust Company*, 164 Misc. 741, 299 N. Y. S. 418, are not an authoritative declaration of the state law."

In *Bank of California* v. *American Fruit Growers*, (D. C. Wash.) 41 F. Supp. 967, the view was expressed that

Federal Courts are not compelled by the *Erie* decision "to accept isolated dicta as being the law of the state." And see also: *Simmons* v. *Simmons,* (D. C. S. C.) 41 F. Supp. 545; *Price* v. *Rothensies,* (D. C. Pa.) 67 F. Supp. 591, 594.

We submit that the true rule is that no Federal Court should accept and follow an isolated *dictum* from a state appellate court, unsupported by other evidence as to the local law, and particularly where it is in principle (as here) opposed to the general law of the state. In such cases the Federal Court should not speculate or prophesy as to what the state court might decide on the present facts, but should render the decision "which reason dictates" upon its own authority, and with the assurance that such actually is, and will be, the local law.

From the foregoing decisions of Courts of Appeals, it is apparent that those courts for the Fourth and Fifth Circuits (and probably for the Second) do not believe that under the doctrine of the *Erie* case, they are either required to or should follow *obiter dicta* of the state courts in determining the local law. *New England Mutual Life* v. *Mitchell,* (4 Cir.) 118 F. 2d 414 (Cert. denied 314 U. S. 629); *Powell* v. *Maryland Trust Co.,* (4 Cir.) 125 F. 2d 260 (Cert. denied 316 U. S. 671, 711); *DeLong* v. *Jefferson Standard Life,* (5 Cir.) 109 F. 2d 585 (Cert. denied 310 U. S. 635); *Buder* v. *New York Trust Co.,* (2 Cir.) 107 F. 2d 705 (Cert. denied 309 U. S. 622).

The Court of Appeals in the present case has followed language contained in an opinion of an intermediate state court which does not logically constitute even a *dictum;* but if, for the sake of argument, it be considered as such, then, we think there exists a conflict between the rules of decision of the different circuits in a field which is vital under the *Erie* decision. It will not suffice to say that the

Court of Appeals conceded in the present case that the "dictum" was not binding; the important point is that it *did follow it,* without attempting to decide the question independently and expressly declining (R. 193-194) even to *"intimate"* its own view. We submit that such a conflict between circuits should constitute a sufficent basis for the assumption of jurisdiction by this court.

III.

The Court of Appeals Has Also Departed from the Accepted and Usual Course of Judicial Proceedings, and Created a Conflict with Other Circuits, in Applying a Rule of Decision of Its Own Creation by Which It Accepts (Without Independent Inquiry) a "Permissible Conclusion" of a District Judge on a Doubtful Question of Local Law.

The present opinion of the Court of Appeals restates a rule of practice of its own creation (R. 193) to the effect that:

> "* * * the considered views of a District Judge as to the law of his State will be accepted as to doubtful questions of local law (*National Bellas Hess, Inc.,* v. *Kalis,* this Court, ... F. 2d ....., decided October 9, 1951; *Buder* v. *Becker,* this Court, 185 F. 2d 311, 315; *Western Casualty & Surety Co.* v. *Coleman,* this Court, 186 F. 2d 40, 43). * * * we cannot say that he has not reached 'a permissible conclusion' (*Coleman case, supra,* p. 43)."

The court then proceeds to combine the effect of the *"permissible conclusion"* of the District Judge with that of the supposed *dictum* from the *Rice* opinion and thus builds a vehicle in which it embarks upon *"the judicial venture"* already discussed. If neither of these premises is legally sound, then we may reason that the conclusion

is unsupported. We have already discussed the dictum point, and we proceed here, briefly, to the other.

The rule of practice so announced seems to have first appeared in the case of *Magill* v. *Travelers Ins. Co.*, (8 Cir.) 133 F. 2d 709, 713; since that time it has been announced in various cases, most of which are compiled in footnote 2 on page 315 of 185 F. 2d, reporting the opinion in the case of *Buder* v. *Becker*. We shall therefore not cite them here. The substance of this rule simply is that if the Court of Appeals finds that a District Court has reached a *permissible conclusion* on a doubtful question of state law, then the case will be affirmed, without any independent consideration of the state law by the Court of Appeals. Indeed the Court of Appeals has said that under such circumstances *"we will not reverse, even though we may think the law should be otherwise"* (*Western Cas. Co.* v. *Coleman*, 186 F. 2d 40, 43; *National Bellas Hess, Inc.*, v. *Kalis*, 191 F. 2d 739, 741).

We respectfully submit that in following that peremptory rule of practice the Court of Appeals for the Eighth Circuit is failing to exercise fully its independent appellate jurisdiction, and is likewise failing to give litigants the benefit of a full appellate review in diversity cases involving questions of state law.

The rule appears to be contrary to such practice in every other circuit of the United States. Thus see: First Circuit: *Boston Casualty Co.* v. *Bath Iron Works Corp.*, 136 F. 2d 31, 33; Second Circuit: *Cooper* v. *American Airlines*, (2 Cir.) 149 F. 2d 355, 357-8; *Janes* v. *Sackman Bros. Co.*, 177 F. 2d 928, 932-3; Third Circuit: *Barrett* v. *Denver Tramway Corp.*, 146 F. 2d 701, 702; Fourth Circuit: *New England Mut. Life Ins. Co.* v. *Mitchell*, 118 F. 2d 414, cert. den. 314 U. S. 629; Fifth Circuit: *Holliday* v. *Wade*, 117 F.

2d 154, 156; Sixth Circuit: *Egyptian Supply Co.* v. *Boyd,* 117 F. 2d 608, 612; Seventh Circuit: *Chicago, Wilmington and Franklin Coal Co.* v. *Herr,* 127 F. 2d 1010, cert. den. 317 U. S. 669; Ninth Circuit: *Hughes* v. *Mut. Life Ins. Co.,* 180 F. 2d 542, 545; Tenth Circuit: *Versluis* v. *Town of Haskell,* Okla., 154 F. 2d 935, 937.

The decisions of this court heretofore cited by the Court of Appeals of the Eighth Circuit in support of this rule are not actually in point (See: *Railroad Commission* v. *Pullman,* 312 U. S. 496; *Reitz* v. *Mealey,* 314 U. S. 33; *MacGregor* v. *State Mutual Life,* 315 U. S. 280; *Helvering* v. *Stuart,* 317 U. S. 154; *Steele* v. *General Mills, Inc.,* 329 U. S. 433; *Estate of Spiegel* v. *Commissioner,* 335 U. S. 667; *Propper* v. *Clark,* 337 U. S. 472). Generally speaking, those cases hold that the *Federal Courts* (collectively speaking) must determine for themselves uncertain and difficult questions of state law, but there is nothing to be found which relieves the Federal Appellate Courts from determining independently and according to their own views, *what the correct local law is.*

We are unable to find any authority in the cases adjudicated by this court for the rule announced by the Court of Appeals; on the other hand, this court seems to look primarily at the adjudications of local law by the respective Courts of Appeals, and the inference (at least) is clear that it considers it to be the duty of each Court of Appeals to make an independent determination of the local law; that, we submit, is not properly done by deciding merely that the District Court has rendered a "permissible" decision.

In *Huddleston* v. *Dwyer,* 322 U. S. 232, at l. c. 236, the court said:

> "State law is the controlling rule of decision in this case as to both substantive and procedural rights of the parties. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64; Federal Rules of Civil Procedure, Rules 69 (a), 81 (b), 28 U. S. C., following Sec. 723 (c). It is the duty of the federal appellate courts, as well as the trial court, to ascertain and apply the state law where, as in this case it controls decision. *Meredith* v. *Winter Haven,* 320 U. S. 228."

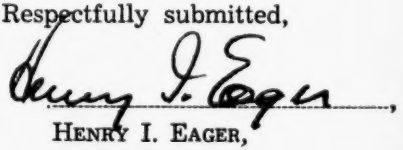
Furthermore, a review of the opinion of the District Court in the present case shows (R. 26 to 32) that it did not really attempt to analyze and follow the *Rice* decision as a declaration of the local law, but proceeded on other theories.

The present point again demonstrates a variation between circuits which should be corrected, as well as an erroneous conception of the court's duty in such cases.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,



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